

Responsible Industry for a Sound Environment Written Comments regarding EPA's "Non-Crop" Issue Paper

Responsible Industry for a Sound Environment ("RISE") on behalf of its members is pleased to submit comments on the "Non-Crop" Issue Paper.

The term "non-crop" has been used for decades on pesticide labels. The meaning of the term is well understood by registrants, applicators and the U.S. Environmental Protection Agency ("EPA" or "the Agency"). However, changing workforces, especially in state lead agencies, and other factors present an opportunity for the Agency to use the State-FIFRA Issues Research & Evaluation Group (SFIREG) forum to increase familiarity and knowledge about the term. The use of the term "non-crop" on pesticide labels should not be debated on a website but should be part of a larger discussion between the Agency, state lead agencies and registrants about improving the clarity of all pesticide labels. We are ready to participate in that discussion.

No objective findings suggest that the long-standing practice of using the phrase "non-crop" to describe certain use sites on pesticide labels has caused a risk to human safety or impacted the methodology for ecological risk and drinking water exposure assessments. However, certain states now assert the use of the term is "confusing," and as such, poses a "significant problem." There is no evidence to support such a conclusion and absent violation of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") or incidents wherein health or risk assessment methodology has been jeopardized, one can only question these claims. One might also posit that the issue is simply a lack of knowledge and understanding of the term non-crop and how it is defined..

In the event the Agency disagrees with our position that education and outreach is the proper course of action, it should facilitate a process for obtaining formal comments via channels approved under the Administrative Procedure Act ("APA") instead of merely soliciting comments via the Enable the Label Discussion Forum.

EPA requested answers to the following questions:

Question 1: Should EPA allow the use of "non-crop" terms on pesticide labels or should the Agency require more specific use sites?

Yes, the EPA should allow the use of the phrase "non-crop" on pesticide labels. The term "noncrop" is well-established and understood by all stakeholders in the industry. Developing a new system would introduce an additional layer of complexity and further confusion, in exchange for little benefit, if any.

Pesticide labels are very complex documents, and a tremendous amount of information has to be printed on the label. If EPA forbids the use of the phrase "non-crop", the most likely alternative practice would be for registrants to individually identify every possible "use site" on the label to ensure compliance with FIFRA. Obviously, it is impractical to name or describe every possible use site, and ensuring a complete listing of the sites (and enforcement of the same) would become extremely challenging, if not impossible. Further, this information is accessible to states through EPA's "Site Name Vocabulary" document.

In 1984, the EPA promulgated 40 CFR Part 158, data requirements for registration (49 FR 42856), and included in Appendix A

(See http://edocket.access.gpo.gov/cfr_2005/julqtr/pdf/40cfr158.740.pdf.) a Use Pattern Index of 14 *Pesticide use site groups*, among them, "Noncrop, wide area, and general indoor/outdoor treatments" (Group 10). The Group listed numerous *specific use patterns* under noncrop treatments, among them:

- Uncultivated agricultural areas (nonfood producing)
 - Farmyards
 - Fuel storage areas
 - Fence rows
 - Rights-of-way
 - Fallow land
 - Soil bank land
 - Barrier strips
- Uncultivated nonagricultural areas (outdoor)
 - Airports
- Recreational areas, fairgrounds, race tracks, tennis courts, etc.
 - Campgrounds
 - Recreation area structures
 - Highway rights-of-way
 - Railroad rights-of-way
 - Utility rights-of-way
 - Sewage disposal areas
- Industrial sites (lumberyards, tank farms, etc.)
- Paved areas
 - Private roads and walks
 - Fencerows and hedgerows (non-agricultural)
- Wide area and general indoor/outdoor treatments
 - Rural areas (unspecified)
 - Urban areas (unspecified)
 - Public buildings and structures
 - Animal burrow entrances, dens, tunnels
 - Animal nests
 - Animal trails
 - Mammal feeding areas
 - Bird roosting, nesting areas
 - Bird feeding areas

In Appendix A, a number of specific use patterns under other *pesticide use site groups* are also assigned to the *corresponding general use pattern* “aquatic noncrop”.

When the Pesticide Use Index (see <http://www.epa.gov/pesticides/regulating/usesite/index.htm>) replaced Appendix A after 40 CFR Part 158 was revised in 2007 (72 FR 60933; 10/26/2007), the information on noncrop uses was largely omitted without explanation. The new Pesticide Use Index is largely categorized by the various crop commodities used to establish pesticide residue tolerances, rather than actual use sites. This approach to categorization is inappropriate, potentially confusing, and should undergo wholesale revision to be most useful. The information on noncrop uses needs to be revised and reinstated in a new updated Pesticide Use Index, to be developed with stakeholder input through an appropriate notice-and-comment process.

As EPA is most certainly aware, the utility of these terms for pesticides had already proved valuable and EPA had actually defined them in context of policy decisions for pesticides for Conservation Use Acreage in 1983 [direct citation and link?]:

Cropland - those agricultural areas which may or may not be tilled, but are intended for row crops, field crops, pastures, rangelands, orchards, groves, vineyards, or other such sites utilized for production of agricultural commodities; and those agricultural areas which may or may not be tilled, but are left fallow, planted to vegetative cover crop or are considered conservation use acreage.

Non-cropland - includes, but is not limited to sites such as roadways, parking lots, utility sub-stations, tank farms, lumberyards, utility right of ways, forest, woodlots, fence rows, animal holding pens, shelterbelts, lawns, ditchbanks, irrigation canals, ponds and streams.

As recently as August 26, 2010 Jeff Herndon, the Associate Director of the Office of Pesticide Program’s Registration Division, affirmed that the term “non-crop” is quite clear when he approved the decision to register a new active ingredient for Use on Non-Crop Areas, Sod Farms, Turf, and Residential Lawns. More specifically, on page 17 of this document the EPA states without qualification that “[the product] is a selective herbicide providing pre- and post-emergent control of broadleaf weeds, woody species, vines, and grasses in *non-crop areas [private, public, and military lands: uncultivated non-agricultural areas (such as airports, highway, railroad and utility rights-of-way, sewage disposal areas), uncultivated non-crop agricultural areas (such as farmyards, fuel storage areas, fence rows, non-irrigation ditchbanks, barrier strips), outdoor industrial sites (such as lumberyards, pipeline, and tank farms), natural areas (such as wildlife management areas, wildlife openings, wildlife habitats, recreation areas, campgrounds, trailheads, and trails)], turf/lawns (residential, industrial, and institutional), golf courses, parks, cemeteries, athletic fields, and sod farms.*” (emphasis added).

If the EPA were to forbid the use of the phrase "non-crop" on pesticide labels, a considerable number of labels will be impacted. Such a decision would affect hundreds of registrants and require an extremely burdensome commitment (and expense) while potentially creating further confusion among state lead agencies. Certainly, such a far-reaching decision falls within the scope of the APA Rulemaking process developed to address issues just like this one. RISE respectfully requests that the EPA review its files to determine the quantity of labels that would be impacted by such a decision. RISE is confident that EPA will agree that the consequences warrant a more extensive procedure than the current process for soliciting feedback and comments.

Finally, RISE suggests that the EPA examine whether these unsubstantiated benefits are equivalent to the burden that it would face as it implements such a modification to the current process. Does the Agency have a plan to implement such a monumental undertaking? How quickly could the Agency process this potentially massive quantity of label changes? In the event that the EPA could not ensure consistent treatment of all registrants, its decision could impact competition by placing some at a disadvantage compared to their similarly situated competitors.

Question 2: What should EPA and/or other stakeholders do to prevent misinterpretation of "non-crop" terminology?

In the event the EPA determines more education is necessary, then it should simply disseminate the information identified above to ensure that pesticide users and regulators are able to determine if a use site (on a pesticide label) is included on the "non-crop area" list. In addition, it could establish a point of contact for the few questions it may receive regarding this long-standing practice. SFIREG meetings offer a forum to disseminate this information and to identify a focal point for state lead agency questions.

In the event the EPA disagrees with this conclusion and deems that more significant regulatory action is required, then RISE strongly suggests that it conduct a formal rulemaking as described in the APA. Modifying the well-established practice used in labeling pesticides would clearly be an Agency action which regulates the future conduct of groups of companies and individuals and which deals primarily with policy considerations.

Question 3: What should be the focus of Agency risk assessments and what data requirements should be applied to products that use the term "non-crop" on the label without any further limiting language?

It is difficult to answer this question, as no evidence has been presented to suggest that the current system creates any risk or hazard. Certainly, the APA rulemaking process provides the best mechanism for gathering comprehensive comments regarding this topic.

All allowed use sites must be subject to a supportive risk assessment. The most inclusive risk assessment should be routinely employed unless explicitly limited by labeling.

If the Agency decides to move forward with this initiative, the PR-Notice or Rule that is established should define a smooth transition with opportunity for public comment... with a goal of minimizing disruption for product labeling already in the channels of trade.

Because the EPA already classifies residential and homeowner uses as something other than “non-crop” or “non-cropland”, the current data requirements already meet the needs for the risk assessment.

Thank you for the opportunity to share our comments with the Agency on the Issue Paper.

Jim Skillen

RISE is a national not-for-profit trade association representing more than 225 producers and suppliers of specialty pesticide and fertilizer products to both the professional and consumer markets. Established in 1991, RISE serves as an advocate and resource and provides current and accurate information on issues and research affecting the specialty pesticide and fertilizer industries.